

**Tucci v Ashland, LLC.**

2023 NY Slip Op 31783(U)

May 26, 2023

Supreme Court, New York County

Docket Number: Index No. 159245/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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EMILIO TUCCI, MARTA TUCCI,  
  
Plaintiff,

INDEX NO. 159245/2022

MOTION DATE 12/06/2022

MOTION SEQ. NO. 001

- v -

ASHLAND, LLC. F/K/A ASHLAND, INC., BASF CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO INMONT CORPORATION AND D/B/A BASF-INMONT, SUCCESSOR IN INTEREST TO AND D/B/A GLASURIT AND R-M COMPANY F/K/A RINSHED MASON COMPANY, E.I. DU PONT DE NEMOURS & COMPANY, ICC CHEMICAL CORPORATION, PPG INDUSTRIES, INC., SHELL OIL COMPANY, SUNOCO, LLC F/K/A SUNOCO, INC. (R&M), TEXACO, INC., UNIVAR USA, INC. F/K/A CHEMCENTRAL CORP., AND VAN WATERS & RODGERS, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 53, 81, 83, 94, 96, 97, 98, 99, 100

were read on this motion to/for DISMISSAL

Upon the foregoing documents, and after oral argument, which took place on March 7, 2023, where Janet Walsh, Esq. appeared for the Plaintiffs Emilio Tucci (“Emilio”) and Marta Tucci (collectively “Plaintiffs”) and Steven E. Garry, Esq. appeared on behalf of Defendant PPG Industries, Inc. (“PPG” or “Moving Defendant”), PPG’s motion to dismiss for lack of personal jurisdiction is denied. PPG’s partial motion to dismiss for failure to state a claim is granted in part and denied in part.

**I. Background**

This action arises out of Emilio’s alleged exposure to benzene containing products which allegedly caused Emilio’s multiple myeloma (“MM”). Plaintiffs initiated this action via Summons

and Complaint dated October 28, 2022 (NYSCEF Doc. 1). Plaintiffs allege that Emilio was employed by General Motors Corporation from 1979 through 2022 (*id.* at ¶ 17). He worked on the paint line and paint repair line, at which time he was allegedly exposed to the benzene containing products (*id.*). Specifically, from 1979 through 1996, Emilio worked at the Tarrytown Plant in Tarrytown, New York. Thereafter, from 1996 through 2006, he worked at a plant in Doraville, Georgia. Emilio worked at a General Motors plant in Arlington, Texas from 2006 through 2022 (*id.*). Plaintiffs allege that Emilio's exposure to benzene-containing products during his employment caused him to be diagnosed with MM on November 2, 2021 (*id.* at ¶ 20). Plaintiffs allege that the named Defendants, amongst other things, manufactured, refined, designed, produced, packaged, sold, distributed, marketed, re-labeled, or supplied the benzene-containing products which allegedly caused Emilio's MM (*id.* at ¶ 18). Plaintiffs allege that the Defendants failed to warn Emilio about the dangers associated with the use of their benzene-containing products (*id.* at ¶ 21).

Plaintiffs allege a variety of causes of action against Defendants. Plaintiffs allege (1) negligence/gross negligence; (2) breach of implied warranty; (3) strict products liability; (4) fraudulent misrepresentation, and (5) loss of consortium (*id.* at ¶¶ 22-117).

PPG made this pre-answer motion to dismiss on November 21, 2022 (NYSCEF Doc. 3). PPG argues that personal jurisdiction over it is improper (NYSCEF Doc. 7). PPG asserts that it "is a Pennsylvania corporation which is headquartered Pennsylvania" and therefore "Plaintiffs' Complaint fails to allege an adequate basis for this court to exercise general or specific personal jurisdiction over PPG." (*id.*). PPG argues that it is fatal to Plaintiffs' Complaint that the Plaintiffs fail to allege where specifically Emilio was exposed to PPG products. According to PPG, because Plaintiffs have not alleged any nexus between any contacts PPG may have with New York and

Plaintiffs' alleged claims, specific jurisdiction cannot exist, and therefore the Complaint against PPG should be dismissed.

In the alternative, PPG moves for partial dismissal pursuant to CPLR § 3211(a)(7). PPG argues that cause of action alleging fraudulent misrepresentation should be dismissed because Plaintiffs failed to sufficiently plead justifiable reliance. PPG argues that because Plaintiffs only allege that "[Emilio] and others around him relied upon the fraudulent representations, misrepresentations and omissions made by the Defendants and to [Emilio's] detriment..." that the fraud claim should be dismissed pursuant to the particularity requirements of CPLR § 3016(b).

PPG also moves to dismiss the breach of implied warranty of merchantability claim. PPG argues that this claim must be dismissed because the only allegation regarding PPG's products were that they are "unfit for use, not properly merchantable and not safe, as marketed, for their ordinary and/or foreseeable use and purpose, in that they contained benzene and caused lymphohematopoietic disease, including MM." PPG argues that while this allegation might sustain a claim for products liability, it cannot sustain a claim for a breach of the implied warranty of merchantability. PPG reasons that this is because the implied warranty of merchantability is not a guaranty that the product will be perfectly safe, but rather "is a guarantee that the product will do what it is supposed to do." PPG argues that because its products were designed to paint and coat surfaces, and there is no allegation that the products did not paint and coat surfaces, there is no claim for breach of the implied warranty of merchantability claim. PPG also argues that if this claim survives, it should be limited to the four-year statute of limitations for breach of the implied warranty of merchantability. Finally, PPG argues that the claim for punitive damages should be dismissed because Plaintiffs have failed to properly plead entitlement to such damages.

On January 13, 2023, Plaintiffs filed their opposition (NYSCEF Doc. 31). Plaintiffs allege that jurisdiction is proper because Emilio was exposed to PPG's benzene-containing products in New York, thereby causing or contributing to his injuries in New York (NYSCEF Doc. 42). Plaintiffs allege that PPG continuously, regularly, and systematically conducted business in the State and County of New York. Moreover, Plaintiffs allege that PPG manufactured, distributed, marketed, supplied, and sold Ditzler brand automotive lacquer paints and lacquer thinners, automotive enamel paints and enamel reducers, automotive polyurethane paints and polyurethane paint reducers, paint thinners, lacquer thinners, and paint strippers, which Emilio was exposed to in New York. Plaintiffs also argue that while they concede this Court does not have general jurisdiction over PPG, the Moving Defendant provides no analysis as to why specific jurisdiction does not apply. Plaintiffs also argue that they are not required to make a *prima facie* showing that personal jurisdiction exists, but must only demonstrate that facts "may exist" to exercise personal jurisdiction. Plaintiff has also provided evidence gained in an earlier action that Emilio was exposed to paints at the Tarrytown Plant, and that PPG distributed paints to the Tarrytown Plant. Plaintiff argues at a minimum it should be allowed to conduct jurisdictional discovery, as opposed to the drastic remedy of dismissing the Complaint as to PPG altogether.

Regarding PPG's partial motion to dismiss per CPLR 3211(a)(7), Plaintiffs argue that they have adequately pled fraudulent misrepresentation. Plaintiffs assert they have satisfied CPLR § 3016(b) by alleging sufficient facts and circumstances to permit a reasonable inference of misconduct. Plaintiffs also stress that whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss, and that the Complaint contains 62 paragraphs setting forth specific allegations of fraudulent misrepresentation.

Regarding the breach of the implied warranty of merchantability claim Plaintiffs argue that their allegations are sufficient because they have alleged PPG's products, due to their benzene content, have a propensity to cause cancer, which was not their intended, ordinary, and stated purpose for use. Plaintiffs argue that the breach of the implied warranty of merchantability claim should not be dismissed on statute of limitations grounds at this juncture without the opportunity for discovery. Plaintiffs instead concede that if there is no evidence of exposure to PPG's products within the four years prior to the filing of the Complaint, then at the close of discovery, Plaintiffs' breach of the implied warranty of merchantability claim should be dismissed. Finally, Plaintiffs argue that their gross negligence allegations and fraudulent misrepresentation causes of action support a claim for punitive damages.

PPG filed its reply on January 19, 2023 (NYSCEF Doc. 53). PPG reasserts that specific jurisdiction cannot exist where Plaintiffs fail to allege that Emilio was exposed to any particular PPG product while employed at the Tarrytown plant. PPG argues that because "all alleged occupational exposures are lumped together" Plaintiff has failed to properly allege personal jurisdiction. PPG also argues that Plaintiffs should not be given the opportunity to conduct jurisdictional discovery since "Plaintiffs can properly create jurisdiction in this case by explicitly asserting in a Verified Complaint that Mr. Tucci was exposed to PPG products while employed at the General Motors Tarrytown Plant in New York."

## **II. Discussion**

### **A. Personal Jurisdiction**

PPG's motion to dismiss for lack of personal jurisdiction is denied. A Court may exercise personal jurisdiction over a Defendant if there exists general jurisdiction or specific jurisdiction. The ultimate burden is on the plaintiff to demonstrate, through affidavits and relevant documents,

that personal jurisdiction exists (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). However, to successfully oppose a motion to dismiss for lack of personal jurisdiction, a plaintiff must only make a prima facie showing that a defendant is subject to personal jurisdiction (*Sacco v Reel-O-Matic, Inc.*, 183 AD3d 567, 568 [2d Dept 2020]).

Specific jurisdiction exists where a lawsuit arises out of a defendant's contacts with the forum state (*Al Rushaid v Pictet & Cie*, 28 NY3d 316 [2016]). Specific jurisdiction requires a two-pronged inquiry: first, whether a defendant conducted sufficient activities within the state; and second, whether a plaintiff's claims have an articulable nexus to a defendant's transactions within the state (*English v Avon Products, Inc.*, 206 AD3d 404, 406 [1st Dept 2022]). If specific jurisdiction exists, the Court still must determine whether the exercise of jurisdiction comports with due process (*Williams v Beemiller, Inc.*, 33 NY3d 523, 529 [2019]). The due process inquiry requires the Court to determine whether the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice" (*J. McIntyre Machinery, Ltd. v Nicastro*, 564 US 873 [2011]). This is a fact dependent inquiry. As stated by Justice Anthony Kennedy, this inquiry "requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." (*Id.* at 884). The Court of Appeals has held that even where physical presence is lacking, jurisdiction may still be proper if the defendant projects itself into New York to engage in a sustained and substantial transaction of business (*Fischbarg v Doucet*, 9 NY3d 375, 381-382 [2007]).

It is undisputed that this Court does not have general jurisdiction over PPG. Therefore, jurisdiction hinges on whether this Court can exercise specific jurisdiction. The Court finds that

specific jurisdiction exists here. Emilio provided deposition testimony in a parallel action captioned *Laurie Murphy v E.I. Du Pont De Nemours & Co. et. al.*, Sup. Ct., New York Co., Index No.: 1562017/2018 (the “Murphy” action). That deposition testimony was provided by Plaintiffs in opposition to PPG’s motion to dismiss (*see* NYSCEF Doc. 36). In Emilio’s deposition transcript in the Murphy Action, Emilio recounts working with PPG who supplied primer while employed at General Motors’ Tarrytown plant (*id.* at 90:9-20 [“I remember PPG was – supplied the primer”]). Therefore, Plaintiffs have provided sufficient evidence to demonstrate specific jurisdiction, as it is uncontroverted that Emilio used PPG primer in New York, and Emilio is alleging that primer was a substantial factor in causing his MM (*see Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). Indeed, the evidence proffered in opposition establishes sufficient nexus between PPG’s contacts with New York and Emilio’s alleged injury.

Nor is due process offended by exercising specific jurisdiction. It is alleged, and not rebutted, that PPG regularly supplied paint products to a General Motors’ Plant in New York. This distribution and supply chain is far more than “fortuitous circumstance” and therefore notions of due process are not offended (*cf. Williams v Beemiller, Inc.*, 33 NY3d 523 [2019] [the test for whether a non-domiciliary tortfeasor purposefully avails itself of the privilege of conducting activities within the forum state, such that the exercise of personal jurisdiction comports with due process, envisions something more than the fortuitous circumstance that a product sold in another state later makes its way into the forum jurisdiction through no effort of the defendant]).

While PPG appears to attack the pleadings in support of its motion to dismiss, this argument is misplaced and inapplicable. Indeed, as Hon. Louis L. Nock held in the Murphy Action, “the relevant inquiry...is not whether the plaintiff has properly *pled* jurisdiction, but whether there *actually* is a legal basis to assert personal jurisdiction over them” (*see Murphy v E.I. Du Pont De*



*Nemours & Co.*, 2020 N.Y. Slip Op. 31659(U) [Sup. Ct. NY Co. 2020]). Accordingly, the motion to dismiss based on lack of personal jurisdiction is denied.

**B. Partial Motion to Dismiss Pursuant to CPLR 3211(a)(7).**

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

PPG's motion to dismiss Plaintiffs' fraudulent misrepresentation claim is denied. To sufficiently allege fraudulent misrepresentation, a plaintiff must allege (1) defendant made a material false representation, (2) defendant intended to defraud plaintiffs thereby, (3) plaintiffs reasonably relied upon representation, and (4) plaintiffs suffered damages as a result of their reliance (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [1st Dept 2005] citing *Swersky v Dreyer and Traub*, 219 AD3d 321 [1st Dept 1996]). CPLR 3016(b) imposes a heightened pleading standard for fraud. However, that requirement is not to be interpreted "to prevent an otherwise valid cause of action in situations where it may be 'impossible to detail the circumstances constituting a fraud'" (*Pludeman v Northern Leasing Systems, Inc.* 10 NY3d 486, 491 [2008] citing *Lanzi v Brooks*, 43 NY2d 778, 780 [1977] quoting *Jered Contr. Corp. v New York City Tr. Auth.*,

22 NY2d 187, 194 [1968]). Plaintiffs here specifically allege that the Defendants knew their products had dangerous levels of benzene yet manipulated public information to give the impression their products were safe, and prevented disclosure of information regarding the true and full nature of the health hazards of benzene (NYSCEF Doc. 1 at ¶¶ 56 and 80-84). Plaintiffs allege that Emilio relied upon the fraudulent misrepresentations and omissions made by Defendants, including PPG, and as a result, he contracted MM (*id.* at ¶¶ 113-114). At this juncture, and under the liberal CPLR 3211(a)(7) standard, the Court finds that the detailed allegations regarding PPG's allegedly fraudulent conduct is sufficient to state a claim for fraudulent misrepresentation.

PPG's motion to dismiss Plaintiffs' request for punitive damages is denied. A request for punitive damages is allowed where, as here, a defendant is alleged to have acted in a grossly negligent fashion (*11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 81 AD3d 516 [1st Dept 2011]; *Fonda v 157 E. 74th Co.*, 158 AD2d 297 [1st Dept 1990]). At this stage, where the gross negligence and fraudulent misrepresentation claims still stand, it is premature and unwarranted to strike the demand for punitive damages.

PPG's motion to dismiss Plaintiffs' cause of action for breach of the implied warranty of merchantability is granted in part and denied in part. Pursuant to U.C.C. § 2-314(2)(c) there may be a breach of the implied warranty of merchantability if goods are unsafe "when used in the customary, usual and reasonably foreseeable manner" (*Denny v Ford Motor Co.*, 87 NY2d 248, 258-259 [1995]). Here, it is alleged that the PPG products used were unsafe in that they caused cancer when they were used for their usual and customary purpose. Accepting all of Plaintiffs' allegations as true, as this Court must on a pre-answer motion to dismiss for failure to state a claim, the allegations sufficiently allege breach of the implied warranty of merchantability. However,

PPG is correct that the statute of limitations limits Plaintiffs' claims, and therefore the breach of the implied warranty of merchantability claim is limited to any exposure to PPG products on or after October 28, 2018. Any other alleged breaches of the implied warranty prior to October 28, 2018 are time barred and therefore dismissed.

Accordingly, it is hereby,

ORDERED that PPG's motion to dismiss is granted solely to the extent that Plaintiffs' second cause of action alleging breach of implied warranty is dismissed as to any alleged breaches of the implied warranty prior to October 28, 2018; and it is further

ORDERED that PPG's motion to dismiss is otherwise denied; and it is further

ORDERED that the parties are directed to appear for an in-person preliminary conference with the Court on June 21, 2023 in Room 442, 60 Centre Street, New York, New York at 9:30 a.m. If the parties agree to a proposed preliminary conference order prior to the conference, the parties shall e-mail the proposed order to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov), thereby obviating the need to appear in-person; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/26/2023

DATE

*Mary V Rosado JSC*  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: